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Ineffective Assistance of Counsel: People v. Allah

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satisfying this burden, there will be no violation of either the Sixth Amendment or article I, section 6, of the New York State Constitution. Only “serious” defects will render counsel ineffective, thereby affording the defendant a valid constitutional claim.

People v. Allah¹³⁷¹
(decided November 24, 1992)

The defendant claimed that his State¹³⁷² and Federal¹³⁷³ Constitutional rights to effective assistance of counsel were violated when his attorney failed to represent him during jury deliberations. Although codefendants’ attorney assumed representation, a conflict of interest existed between the defendant and codefendants. The defendant was not made aware of potential risks of having codefendants’ counsel take over his representation. As a result, the New York Court of Appeals held that the defendant was deprived of effective assistance of counsel because his attorney was absent during deliberations.¹³⁷⁴ Furthermore, joint representation by codefendants’ counsel presented an actual conflict of interest, since it was done without the informed consent of the defendant.¹³⁷⁵ Therefore, the order of the appellate division, affirming the judgment of conviction, was reversed and a new trial ordered.¹³⁷⁶

The defendant was tried in Supreme Court, Kings County in a joint trial with two codefendants. The codefendants, however, were represented by separate counsel. The jury returned a verdict of criminal possession of a weapon in the second degree and

1371. 80 N.Y.2d 396, 605 N.E.2d 327, 590 N.Y.S.2d 840 (1992).

1372. N.Y. CONST. art I, § 6. Section 6 provides in pertinent part: “In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel” *Id.*

1373. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: “In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.” *Id.*

1374. *Allah*, 80 N.Y.2d at 400, 605 N.E.2d at 330, 590 N.Y.S.2d at 843.

1375. *Id.* at 401, 605 N.E.2d at 330, 590 N.Y.S.2d at 843.

1376. *Id.*

robbery in the first degree, but acquitted the codefendants of all charges.¹³⁷⁷ Four individuals, the complainants in this case, were leaving a housing project when they were confronted by a group of males, some of whom were carrying guns. Two of the four individuals were shot.¹³⁷⁸ At trial, the three defendants tried to establish that they were elsewhere when the crimes occurred. However, three of the four complainants identified defendant Allah from a lineup, and again at trial.¹³⁷⁹ In this case, it was the testimony of one of the codefendant's witnesses which created the conflict for the defendant. The witness testified at the trial that she saw defendant Allah running with a gun in his hand immediately after the gunshot was heard. The witness further testified that she had not seen the other two codefendants at the scene.¹³⁸⁰

Originally, all three defendants had been represented by separate counsel.¹³⁸¹ However, during jury deliberations, counsel for defendant Allah informed the court that he would be out of town for a few days, during which time his client would be

1377. *Id.* at 399, 605 N.E.2d at 329, 590 N.Y.S.2d at 842.

1378. *Id.* at 398, 605 N.E.2d at 328, 590 N.Y.S.2d at 841. All four complainants had their hats stolen, and the assailants attempted to take their coats. *Id.*

1379. *Id.* at 398, 605 N.E.2d at 328-29, 590 N.Y.S.2d at 841-42. At trial four other eyewitnesses testified, one of whom stated that her son, a codefendant, was at home fifteen minutes prior to the act in question. Defendant Allah called two witnesses who testified that neither defendant Allah nor his codefendants were present at the incident. *Id.* at 398, 605 N.E.2d at 329, 590 N.Y.S.2d at 841.

1380. *Id.* at 398-99, 605 N.E.2d at 328-29, 590 N.Y.S.2d at 841-42. The testimony given by this witness clearly demonstrated the conflict that existed by the joint representation of defendant Allah because this testimony implicated the defendant, while being advantageous to the two codefendants. *Id.*

1381. *Id.* at 399, 605 N.E.2d at 329, 590 N.Y.S.2d at 842. After the charge to the jury, codefendant Robinson's attorney informed the court that due to a medical emergency, he would leave his client in the temporary representation of codefendant Thompson, with his client Robinson's consent. In addition, Robinson's counsel stated that "he may consent to the readback, the delivery of evidence to the jurors and do anything that I might have done if I were here." *Id.*

jointly represented by codefendant Robinson's attorney.¹³⁸² The trial court made no attempt to inquire whether this was acceptable to the defendant nor did it warn defendant Allah of any potential or actual conflict which might result from joint representation.¹³⁸³ The appellate division unanimously affirmed the conviction of defendant Allah, and held that the absence of Allah's attorney and the subsequent joint representation by codefendants counsel did not deprive defendant of his right to effective assistance of counsel.¹³⁸⁴

On appeal, however, the New York Court of Appeals agreed with defendant Allah and found that representation by codefendants' counsel violated his right to counsel.¹³⁸⁵ The court reasoned that defendant was not afforded his right to effective assistance of counsel because there was a conflict of interest with testimony of one of the codefendant's witnesses and that it directly implicated Allah.¹³⁸⁶ This witness' testimony was clearly

1382. *Id.* In particular, defendant Allah's attorney stated that codefendants' attorneys could "consent to read backs, presentation of evidence, et cetera, and my client Iraefbey Allah has also consented[.]" to such joint representation. Defendant Allah's consent to such was preserved on the record. *Id.*

1383. *Id.*

1384. *People v. Allah*, 576 N.Y.S.2d 30, 31, 177 A.D.2d 490, 491 (2d Dep't 1991, *rev'd*, 80 N.Y.2d 396, 605 N.E.2d 357, 590 N.Y.S.2d 840 (1992)). The appellate division based its holding on the fact that the record revealed that defendant Allah, after being informed that his attorney would be away for a few a days, expressly consented, in court, to be represented by the codefendants' attorneys. Furthermore, the court noted that defendant's joint representation by codefendants' attorney was effectively undertaken; nothing indicated that the joint representation during deliberations created "a significant possibility of a conflict of interest . . . bearing a substantial relationship to the conduct of [his] defense." *Id.* (quoting *People v. Recupero*, 73 N.Y.2d 877, 879, 535 N.E.2d 287, 289, 538 N.Y.S.2d 234, 236 (1988)). However, the court did note its disapproval of the lower court having permitted defendant's counsel to leave during jury deliberations without having set forth an explanation for his absence. *Id.* at 31, 177 A.D.2d at 491.

1385. *Allah*, 80 N.Y.2d at 400, 605 N.E.2d at 330, 590 N.Y.S.2d at 843.

1386. *Id.* The principle issue on appeal was whether or not the defendant's right to effective assistance of counsel was violated when his defense counsel's absence led to his being jointly represented by codefendants' counsel, in

adverse to defendant Allah's contention that he was not present at the scene of the crime. Furthermore, the testimony tended to exculpate the two codefendants, and thus a conflict existed since counsel jointly represented all of the defendants.¹³⁸⁷ Therefore, defendant Allah's right to counsel was impaired by this joint representation since an attorney has an "undivided responsibility" to his client and his client alone.¹³⁸⁸

In reaching its decision, the court reaffirmed the principle established in *People v. Macerola*¹³⁸⁹ and *People v. Gomberg*,¹³⁹⁰ requiring the trial court, on the record, to inquire whether each defendant has an "awareness of the potential risks involved in that course and has knowingly chosen it"¹³⁹¹ when he consents to joint representation. Only after the trial court has sufficiently cautioned all defendants of the inherent dangers involved in such representation, may a defendant's right to effective assistance of counsel be said to have been adequately

addition to whether or not the defendant knowingly chose to accept such representation. *Id.*

1387. *Id.* In essence, the court was satisfied that an actual conflict of interest existed in defendant Allah being jointly represented by counsel of his codefendants where a key witness "implicated defendant while establishing a defense for codefendants Thompson and Robinson." *Id.*

1388. *Id.*

1389. 47 N.Y.2d 257, 391 N.E.2d 990, 417 N.Y.S.2d 908 (1979). In *Macerola*, the court held that the failure of the trial judge to ascertain, on the record, whether each defendant was aware of the potential risks inherent in joint representation of codefendants, constituted reversible error, where conflict existed between each defendant's defense. *Id.*

1390. 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975). In *Gomberg*, the court held that "trial court adequately and properly inquired of defendants and their attorneys whether joint representation would result in conflict of interest." *Id.* A defendant who then knowingly and intelligently retains such representation cannot claim possible prejudice. Where the court made such inquiries, defendants' right to effective assistance of counsel was sufficiently protected. This was so even where one defendant initially expressed some reluctance, but later acquiesced in the continuation of such joint representation. Furthermore, the court gave the defendants added protection against the possibility of conflicts of interest arising, and advised that if at a later stage of the trial a conflict arose, the court would permit other counsel to represent each individual defendant. *Id.*

1391. *Allah*, 80 N.Y.2d at 400, 605 N.E.2d at 330, 590 N.Y.S.2d at 843.

and properly safeguarded.¹³⁹² Such admonition by the trial court must be on the record in order to preserve the issue for appeal and therefore make it possible for the appellate courts to determine whether a jointly represented defendant made an informed decision.¹³⁹³

The court noted that in this case, since joint representation arose at a crucial stage of trial — jury deliberation — the defendant must be apprised of this conflict to ensure that his consent to joint representation was based on informed consent.¹³⁹⁴ Since there was nothing on the record to indicate that the trial court took the necessary precautions to ensure that defendant perceived the potential risks inherent in pursuing the joint representation, the court concluded that defendant's consent was not an informed one.¹³⁹⁵ Therefore, the joint representation the defendant received deprived him of the right to the effective assistance of counsel.¹³⁹⁶

In *Macerola*,¹³⁹⁷ the court of appeals stated that “it is indisputable that one accused of committing a crime is entitled to the effective assistance of counsel.”¹³⁹⁸ This right is guaranteed not only by both the State¹³⁹⁹ and Federal Constitutions,¹⁴⁰⁰ but also by New York State statute.¹⁴⁰¹ Thus, the New York Court

1392. *Id.*

1393. *Id.*

1394. *Id.*

1395. *Id.* at 401, 605 N.E.2d at 330, 590 N.Y.S.2d at 843.

1396. *Id.*

1397. *Macerola*, 47 N.Y.2d at 257, 391 N.E.2d at 990, 417 N.Y.S.2d at 908.

1398. *Id.* at 262, 391 N.E.2d at 992, 417 N.Y.S.2d at 910.

1399. N.Y. CONST. art. I, § 6.

1400. U.S. CONST. amend. VI.

1401. N.Y. CRIM. PROC. LAW § 210.15 (McKinney 1993). This statute provides:

1. The defendant has a right to aid of counsel at the arraignment and at every subsequent stage of the action, and, if he appears upon such arraignment without counsel, has the following rights:
 - (a) To an adjournment for the purpose of obtaining counsel; and

of Appeals has recognized that this right may be significantly impaired when counsel engages in the joint representation of defendants with conflicting interests.¹⁴⁰² However, the joint representation of a criminal defendant is not a per se violation of a defendant's state¹⁴⁰³ or federal constitutional right¹⁴⁰⁴ and may be allowed. The distinction in New York arises when codefendants are represented by the same attorney. When this occurs, the trial court must determine whether "the defendant's decision to proceed with his attorney is an informed decision."¹⁴⁰⁵ The rationale for imposing such inquiries is to assure thorough and effective representation. To effectuate such representation, a defense attorney must be able to cross-examine witnesses, plan defense strategies, enter into plea negotiations, maintain confidential relations, and the like.¹⁴⁰⁶ Therefore, prior to the formal commencement of trial, the judge must ascertain, on the record, whether each defendant is aware of the potential

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- (b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a relative or friend that he has been charged with an offense; and
 - (c) To have counsel assigned by the court in any case where he is financially unable to obtain the same.
3. The court must inform the defendant of all rights specified in subdivision two. The court must accord the defendant opportunity to exercise such rights and must itself take such affirmative action as is necessary to effectuate them.

Id.

1402. *Gomberg*, 38 N.Y.2d at 312, 342 N.E.2d at 553, 379 N.Y.S.2d at 773 (citing *Glasser v. United States*, 315 U.S. 60, 70 (1942)).

1403. *See People v. Gonzalez*, 30 N.Y.2d 28, 34, 280 N.E.2d 882, 885, 330 N.Y.S.2d 54, 59 (1972) (finding no Sixth Amendment violation where no conflict results from joint representation of codefendants).

1404. *See Holloway v. Arkansas*, 435 U.S. 475 (1978). The United States Supreme Court held that joint representation is not a per se violation of the constitutional right to effective assistance of counsel, however, a violation was found where the trial judge failed to investigate the claim that a possible conflict of interest existed regarding defendant's attorney. *Id.* at 484.

1405. *Gomberg*, 38 N.Y.2d at 313, 342 N.E.2d at 554, 379 N.Y.S.2d at 774.

1406. Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986).

risk of joint representation, and whether the defendant has nevertheless knowingly consented.¹⁴⁰⁷

A criminal defendant's right to effective assistance of counsel in New York differs significantly from that right under the Federal Constitution.¹⁴⁰⁸ Under the Federal Constitution, a trial court does not have an affirmative duty to initiate an inquiry of jointly represented defendants unless it has reason to know that a conflict may actually exist.¹⁴⁰⁹ In *Cuyler v. Sullivan*,¹⁴¹⁰ the Supreme Court held that prejudice is presumed "when counsel is burdened by an actual conflict of interest."¹⁴¹¹ Furthermore, prejudice will only be presumed if the defendant can demonstrate that his defense counsel was actually representing conflicting interests, and that it had an adverse affect on counsel's performance.¹⁴¹² The Court stated that the Sixth Amendment does not require state courts to "initiate inquiries into the propriety of multiple representation in every case."¹⁴¹³ Rather, the Court noted that defense counsel's duty to avoid conflicting representation, and to advise the court if such conflict arises, adequately safeguards a criminal defendant's Sixth Amendment

1407. *Gomberg*, 38 N.Y.2d at 313-14, 342 N.E.2d at 554, 379 N.Y.S.2d at 775. In addition, counsel must inform his clients of any conflicting interests that may infringe upon such representation. *Id.*

1408. U.S. CONST. amend VI.

1409. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). In *Cuyler*, the Court concluded that since the codefendants had separate trials, it significantly reduced the potential conflict of interest. Furthermore, it noted that no objection was made to the multiple representation, thus, the trial court had no duty to inquire into the possibility of conflict of interest. *Id.* at 347.

1410. 446 U.S. 335 (1980).

1411. *Id.* at 349-50. An attorney breaches a duty of loyalty owed the client when burdened by actual conflict of interest. *Id.* at 346; *see also* *Strickland v. Washington*, 466 U.S. 668 (1984). The Court noted that certain exceptions exist wherein prejudice is presumed where "[a]ctual or constructive denial of assistance altogether is legally presumed to result in prejudice." *Id.* at 692.

1412. *Cuyler*, 446 U.S. at 348; *see also* *Burger v. Kemp*, 483 U.S. 776, 785 (1987) (finding no Sixth Amendment violation when counsel's law partner represented defendant's co-indictee where no showing was made that counsel ever had to choose between conflicting interests).

1413. *Cuyler*, 446 U.S. at 346.

right.¹⁴¹⁴ Therefore, there is no affirmative duty upon a trial court to initiate an inquiry unless it knows that a conflict of interest exists.¹⁴¹⁵

Although New York's requirement of adequate inquiry differs from that imposed by the federal courts, the constitutional right to effective assistance is essentially identical.¹⁴¹⁶ Under both the State and Federal Constitution, a defendant can knowingly and

1414. *Id.*; see also *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978) (defense counsel is in best position to determine when a conflict of interest exists or will develop during trial).

1415. *Cuyler*, 446 U.S. at 347.

1416. In addition, the federal courts similarly protect a defendant's right to effective assistance of counsel. Federal Rule 44(c) of Criminal Procedure states that

whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

FED. R. CRIM. P. 44(c); see also MODEL RULES OF PROFESSIONAL CONDUCT 1.7 (1993). Section 1.7 states:

- (a) A lawyer shall not represent a client if the representation of that client will bear directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.

intelligently waive the right to conflict-free assistance of counsel.¹⁴¹⁷

While both the New York and Federal Constitution are in harmony regarding the importance of safeguarding a defendant's right to effective assistance of counsel, the duty imposed on trial courts in New York more adequately safeguard a criminal defendant's right to conflict-free representation. Conversely, the standard maintained under federal law, that there be actual conflict before a duty of inquiry is mandated, may not provide defendants with the requisite knowledge of the inherent risks of such representation.

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

People v. Benson¹⁴¹⁸
(decided January 20, 1994)

Defendant claimed that the failure of his counsel to raise the issue of his statutory right to a speedy trial, amounted to a denial of the effective assistance of counsel guaranteed under the State¹⁴¹⁹ and Federal¹⁴²⁰ Constitutions.¹⁴²¹ The court remitted

1417. *Gomberg*, 38 N.Y.2d at 313, 342 N.E.2d at 553-54, 379 N.Y.S.2d at 774. (finding that defendant can knowingly and intelligently waive right to separate representation).

1418. ___ A.D.2d ___, 606 N.Y.S.2d 828 (3d Dep't 1994).

1419. N.Y. CONST. art. I, § 6. This provision states, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel" *Id.*

1420. U.S. CONST. amend. VI. This provision states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defense." *Id.*; see also *Reece v. Georgia*, 350 U.S. 85, 90 (1955) (stating that the right to counsel includes the effective assistance of counsel).

1421. *Benson*, ___ A.D.2d at ___, 606 N.Y.S.2d at 828.